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Charles M. Yablon

Benjamin N. Cardozo School of Law, yablon@yu.edu

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JUDICIAL PROCESS AS AN EMPIRICAL STUDY: A COMMENT ON JUSTICE BRENNAN'S ESSAY

Charles M. Yablon*

I. LOOKING AT WHAT JUDGES ACTUALLY DO

One of the enduring accomplishments of the Legal Realist movement was to shift at least some of the attention of academic lawyers away from their favorite occupation—telling judges what to do—and to get them to consider what it is that judges *actually* do. The generation of legal scholars who immediately preceded the Realists had attacked the formalism of judicial decisionmaking, criticizing judges for mechanically applying formal rules without considering social needs or public policy.¹ The Realists, while sympathetic to this prescriptive claim about the *proper* role of judges, added to it a descriptive claim, that judges did not *in fact* decide cases through mechanical application of general rules, that such formal rules were indeterminate at the level of practice, and did not yield certainty or predictable results.² Certainty and predictability, to the extent they existed in the legal system, were the product of the “personality of the judge,” not the

* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. I am grateful to David Rudenstine for his thoughtful suggestions on an earlier draft of this piece, and to Rick Antonoff for his careful and able research assistance.

¹ For example, Roscoe Pound's prescriptivist claim charged the formalists with using “mechanical” jurisprudence—empty words and meaningless deductions—achieving “unscientific” arbitrary results. He proposed a study of law using pragmatic scientific methodology to achieve a “sociological” jurisprudence. See Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 620-21 (1908). Joseph W. Bingham suggested that in order to examine what judges do, we must look at the results of their judicial process; the decisions themselves. This approach takes cause-and-effect analysis, as used in the natural sciences, grounding its conclusions on empirical evidence. See Bingham, *What is the Law?* (pts. 1 & 2), 11 Mich. L. Rev. 1, 11 Mich. L. Rev. 109 (1912). By moving the discourse into the science arena, these lawyers sought to derive knowledge of the judicial process by using scientific models and philosophical abstraction to provide a practical study of law that could resolve social problems.

² See K.N. Llewellyn, *The Bramble Bush* 4 (1960) (“men talk about contracts, and trusts, and corporations, as if these things existed in themselves, instead of being the shadows cast across the front stage by the movements of the courts unheeded in the rear”); Frank, *What Courts Do In Fact*, 26 Ill. L. Rev. 645, 648-51 (1932).

It is therefore by no means certain that the court will learn the truth even about cases involving the simplest facts. And unless *that* is certain, then you cannot be at all sure, before the court has heard the case, what the decision will be. Not even if the rules were clear, definite and precise.

Id. at 650.

formal rule structure.³

Others came forward to argue that the Realist position, if not wrong, was at least highly exaggerated. They argued that judges did indeed rely on formal rules in reaching decisions and that the areas of judicial freedom or creativity were, at best, rather circumscribed.⁴

Thus, for at least the last sixty years or so, the question of how judges actually decide cases has been a respectable academic question, and one that has engendered considerable academic debate. Some scholars have carefully observed, collected, and collated judicial behavior.⁵ Others have conducted thought experiments involving a judge of superhuman intelligence and knowledge, in the hope that describing how such a judge would decide cases can clarify the decisionmaking processes of real judges.⁶ Yet other legal scholars have sought to describe in great detail how they would go about deciding cases if they were judges.⁷

Amidst all this observing, theorizing, and describing, of course, a fairly obvious question emerges. Why not ask the judges? After all, seeking to describe what judges do is not like trying to describe the religious practices of the Etruscans or the migration routes of wild

³ Having served eleven years as a judge, Hutcheson described the process of deciding the difficult case, saying

I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.

Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 *Cornell L.Q.* 274, 278 (1929). Hutcheson made this confession confident that other judges, too, decided cases intuitively. *Id.* See also Frank, *supra* note 2, at 655 (combination of judge's personality and innumerable stimuli produce decisions).

⁴ Hans Kelsen, for example, views the legal system as a hierarchy of norms, with rules at any level traceable to norms at still higher levels, culminating in the "basic norm," which is the premise of the entire system. See H. Kelsen, *Pure Theory of Law* 193-214 (1961). For Hart, the system consists of primary and secondary rules. Primary rules are the informal rules by which social existence is basically conditioned. When conditions change, these rules become uncertain requiring clarification from the secondary rules; which are the rules of recognition, rules of change, and rules of adjudication to determine "whether, on a particular occasion, a primary rule has been broken." H.L.A. Hart, *The Concept of Law* 94 (1961).

⁵ See, e.g., Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. Rev.* 4 (1983).

⁶ See R. Dworkin, *Taking Rights Seriously* 105-30 (1977).

⁷ See Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 *J. Legal Educ.* 518 (1986). Professor Kennedy explores his own decisionmaking as he imagines it would be if he were a judge deciding a case that, for him, "present[s] a conflict between 'the law' and 'how-I-want-to-come-out.'" "The law" is the rule of law derived from precedent that is "expected" to control the case; whereas "how-I-want-to-come-out," is simply what it seems—Kennedy's personal preference as the outcome of the case. *Id.* at 518-20.

geese. Judges are not a vanished race, nor are they particularly hard to find. Moreover, they are highly intelligent and articulate people who seem perfectly capable of explaining, in whatever degree of detail is desired, what it is they do and how they go about doing it.

Accordingly, it is at least somewhat surprising that judges themselves have not played a larger role in the academic debates about what judges do and how judges decide cases. The great exception to this generalization, of course, is Benjamin N. Cardozo, whose work, particularly *The Nature of the Judicial Process*,⁸ had a major impact on the study of judicial decisionmaking. But the paucity of judicial writing on this subject since Cardozo is a matter that merits some consideration.

Two possibilities seem to exhaust the field—either judges do not want to tell us how they decide cases, or they are unable to do so. Let's consider the latter, and seemingly more implausible possibility, first. It seems difficult to believe that individuals whose job it is to decide cases, who do so on an almost daily basis, and who are adept at expressing the legal rationale underlying their opinions, should be unable to tell us how it is they make such decisions. Yet it may not be as implausible as all that, for reasons I hope to make clear below.

Let's first make sure we understand what we are asking these judges to explain. We are not asking them to tell us the legal grounds supporting their decision. Judges do that all the time in the opinions themselves. Moreover, such legal grounds are not hard for judges to find. They are contained in the briefs of the parties submitted to the court. In any competently lawyered case, a judge is likely to have, before he or she makes any decision, at least two briefs that together muster the strongest legal reasons that can be given for deciding the case *either way*. The question we are really asking then, when we ask how a judge decides a case, is how does a judge go about deciding which legal arguments are stronger, or, put a slightly different way, how does a judge decide which side deserves to win?

It is not at all implausible that a judge, even an extremely skillful one, may not be able to articulate how he or she goes about deciding cases in this sense. There are many types of knowledge that we possess and are able to act upon, yet cannot be precisely articulated so as to enable others to act upon them in the same way. Wittgenstein provided a fine example when he asked: Do you know what a Haydn symphony sounds like? Can you tell me?⁹ The point, of course, is that you may know very well what a Haydn symphony sounds like.

⁸ B. Cardozo, *The Nature of the Judicial Process* (1921).

⁹ See L. Wittgenstein, *Philosophical Investigations* 143 (1958).

You may even be able to pick Haydn works out from those of Mozart or early Beethoven. Yet it is unlikely that you can articulate for someone without your level of training and knowledge what precisely it is that you hear that enables you to distinguish Haydn from Mozart, and even more unlikely that you can instruct them how to do the same thing.

It is very possible that deciding cases, in the sense we are speaking of it, is something like this. The trained judge may find it quite easy in many cases to distinguish good arguments from bad, meritorious cases from frivolous ones, even when the formal structure of the arguments appears quite similar. Yet it may be impossible for a judge to articulate, in general terms, what makes a good argument good, a bad argument bad. The judge may be forced to resort, like the Haydn scholar, to examples. If we hear enough Haydn symphonies, and are not completely tone deaf, it is conceivable that we will eventually learn how to pick them out from other music. By the same token, if we read enough good and bad legal arguments, (and are not completely without rhetorical facility) we should eventually learn how to pick out the ones we are told are "good." Indeed, it is hard to see how contemporary law school pedagogy can be justified on any other grounds.

Accordingly, we see that it is quite possible that judges cannot tell us how they decide cases. In fact, some of the most interesting jurisprudential writing from judges has come close to making such a declaration. Hutcheson wrote eloquently of the role of the "hunch" in judicial decisionmaking,¹⁰ and Cardozo too cautioned judges that their intuition was often a truer guide to "correct" decisions than analysis of doctrinal authority.¹¹ But if in fact the nature of the judicial decisionmaking process cannot be articulated, it is certainly within the power of judges to tell us *that*, and some indeed have.

This brings us to the second possibility, that judges do not want either to tell us how they decide cases, or to confess that they cannot articulate how they go about doing so. The reasons for this may be entirely obvious and straightforward. Judges are busy people. They are also, by and large, practical people, who confront, on a regular basis, the manifestations of many of our most pressing social problems. It is not surprising, therefore, that of the minority of judges who choose to speak or write about the law in a nonjudicial capacity, most choose legal topics of more immediate practical concern such as reform of the courts or the criminal justice system.

¹⁰ See Hutcheson, *supra* note 3, at 278.

¹¹ Cardozo, *supra* note 8, at 113.

Yet one must also entertain the less obvious and more interesting possibility that writing about decisionmaking, in the sense we have been discussing it, may strike judges as inappropriate and perhaps even unwise. I do not mean this simply from a careerist point of view, although it is clear from recent events that extrajudicial writing can be injurious to higher judicial aspirations.¹² Rather, I am concerned with the more general and socially motivated claim that it is detrimental to society or the rule of law itself for judges to talk too much about how they decide cases. Even if one assumes that most people know that judges do not simply decide cases mechanically on the basis of preexisting rules, but rather have substantial choice in determining outcomes, one can still question whether it is a good idea to emphasize such judicial freedom and creativity. After all, the structure of the legal process is still designed to give the *appearance* of a formal process with a single right answer. Judges, by and large, still write their opinions syllogistically, describing their decisions as the formal application of controlling legal rules to particular facts. Lawyers still appeal from those decisions by ascribing legal "error" to the opinion below. It would not be surprising if judges, used to speaking and thinking in these terms, would be apprehensive about adopting a mode of discourse that assumes a freedom and creativity their judicial opinions seek to suppress.

These formal structures of determinacy still have real power, and we do not know to what extent public respect for law and the courts is tied up with them. For that reason, it is not at all inconsistent to recognize that there exists substantial judicial freedom, yet not wish to proclaim the fact too publicly. We have seen, therefore, that asking a judge to explain how he or she decides cases is not an easy assignment. It requires serious insight and self-reflection on the part of the judge and a willingness to try to express his or her actions in a manner quite different from that of the judicial opinion. It requires a commitment of time and energy and, perhaps most importantly, a willingness to break with traditional images of the judge's role, and a faith that providing greater insight into what judges actually do will strengthen public respect for the law and the judiciary.

These observations, to the extent they explain the relative paucity of writing by judges about the judicial process, also help us appreciate the value of the essay by Justice Brennan to which this symposium is addressed. Judges rarely speak with so much frankness and insight

¹² See, e.g., Gillers, *The Compelling Case Against Robert H. Bork*, 9 *Cardozo L. Rev.* 33 (1987); Kurland, *Bork: The Transformation of a Conservative Constitutionalist*, 9 *Cardozo L. Rev.* 127 (1987).

about their role, and when they do we should take the opportunity to learn from them. In the next section, I want to do precisely that, by seeking to apply Justice Brennan's insights to an unresolved issue in the writing on judicial process.

II. TWO VIEWS OF JUDICIAL DECISIONMAKING

The question I want to explore involves two different accounts of how judges make decisions when the case before them is not "controlled" by prior precedent or statutory language. Virtually all modern commentators (and judges) agree that such cases exist, although they disagree vigorously as to the extent to which they predominate in the legal system. The notion of "controlling" precedent is itself part of the problem, since no case ever repeats identically the fact situation of a prior one, and no statutory language ever interprets itself. Having made that obligatory bow to the deconstructionists,¹³ the fact remains that lawyers and judges are able to recognize many cases that are "controlled" by statute or prior precedent, but it is not uncommon to read in many judicial opinions a declaration that the issue presented by the case is one of "first impression," for which neither prior cases, statutes, nor legislative history provide a dispositive answer. The question then is, what does the judge do in such circumstances.

One answer, and a prominent one in the legal literature, is that a judge in this situation is a lawmaker, a legislator, and what he or she does is legislate. That is, once the judge determines that the law has "run out," that preexisting legal rules provide no guidance for the particular decision at hand, a judge's decisionmaking process is basically the same as that of a legislator. She considers various legal rules that might be adopted, examines the likely consequences of each in light of her knowledge of American society, and chooses the one she thinks "best" in terms of the broad panoply of considerations—social, economic, political, and equitable—that go into any legislative decision.

This assertion, that the decisionmaking process of the judge in situations where the law has "run out" is essentially a legislative one, can be found in a number of prominent commentators on the nature of the judicial process. It is probably most closely associated with Cardozo himself, who summarized with typical eloquence his view of the similarities between the judicial and legislative role:

Each indeed is legislating within the limits of his competence. No

¹³ See Balkin, *Deconstructive Practice and Legal Theory*, 96 Yale L.J. 743 (1987).

doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. . . . None the less, within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom."¹⁴

A similar view was expressed by H.L.A. Hart, who, in *The Concept of Law*, noted that:

Here at the margin of rules and in the fields left open by the theory of precedents, the courts perform a rule-producing function which administrative bodies perform centrally in the elaboration of variable standards. In a system where *stare decisis* is firmly acknowledged, this function of the courts is very like the exercise of delegated rule-making powers by an administrative body.¹⁵

This account, which I call the "legislative" theory of judicial decisionmaking, views the preexisting legal system as having a determinate scope. A legal question may either fall within that scope, in which case the question is controlled by prior authority, or it does not fall within the scope of preexisting legal rules. In such a case, the "law" has nothing to say to a judge, who must, as Cardozo tells us, exercise a "legislative wisdom" in promulgating a new rule best suited to the needs of society. However, as Hart reminds us, these newly produced rules themselves become a part of the "law," bringing more legal questions within its determinate, but ever-expanding scope. For our purposes, however, the key assertion of the legislative theory is its claim that if a judge is presented with a novel legal question, one beyond the scope of the preexisting rules, then the "law" is irrelevant to that decision, just as it is irrelevant to a legislative decision. Consequently, in evaluating such a decision, one can speak of it as wise or foolish, well or poorly tailored to the needs of society, but not as "lawful" or "unlawful," or "correct" or "incorrect" in terms of the preexisting "law."

The alternative account of judicial decisionmaking, which I call "intuitionist," also recognizes that legal materials may fail to "control" the specific legal issue presented, yet this theory denies that under such circumstances, the judge simply legislates the best or most useful rule. Rather, this theory claims that there is always "something else," to which the judge can resort in reaching a decision. The theory presupposes that there is some aspect of judicial decisionmak-

¹⁴ Cardozo, *supra* note 8, at 113-15.

¹⁵ H.L.A. Hart, *The Concept of Law* 132 (1961).

ing which renders it qualitatively different from legislative decisions, even when the question presented is not "controlled" by any preexisting legal authority.

The various theorists I would lump together as "intuitionists" do not agree as to what the "something else" is that judges bring to the judicial decision. Frank wrote of the importance of the judge's "hunch" as the determining factor in most litigated cases,¹⁶ and Hutcheson extensively analyzed and extolled "the judgment intuitive." The notion that there is a uniquely judicial quality of mind, involving "openness" and "neutrality" is central to Hart and Sachs' account of the judicial process.¹⁷ The uniqueness of the judicial mode of decisionmaking as a shared interpretive enterprise figures prominently in Ronald Dworkin's recent work.¹⁸

While Dworkin, Hart and Sachs, and Frank are not usually thought of as sharing a single legal philosophy, it is clear that on this issue, they do share certain beliefs.¹⁹ The intuitionists would all claim that the fact that one is acting as a judge constrains and limits one's decisionmaking in ways legislators are not constrained. Judges must always take the "law" into account, even when the case before them is not controlled by prior authority. Accordingly, their decisions may be evaluated not only as wise or foolish, but in terms of some notion of "correctness" or "appropriateness" within the prevailing rule system.

The legislative theorists would counter that these supposed unique judicial considerations do not constrain judicial choices at all, but merely determine the form and style in which they are expressed. The judge, like the legislator, first decides what the best rule is, and simply writes it in an opinion rather than a statute.

What we have then are two differing empirical accounts of what it is that judges do when deciding cases that are not controlled by

¹⁶ Frank, *supra* note 2, at 655-56.

¹⁷ See H. Hart & A. Sachs, *The Legal Process: Basic Problems in the Making and Application of Law* (tent. ed. 1958).

¹⁸ See R. Dworkin, *Law's Empire* (1986).

¹⁹ They all agree that when authoritative legal materials run out, the judge does not simply choose the rule she thinks will be "best" in light of all the competing societal considerations, but rather applies a uniquely judicial mode of arriving at the appropriate result. True, the intuitionists are never particularly clear on what this unique judicial mode of decisionmaking is, and it takes rather different forms in the works of the different scholars on the intuitionist side of this grand dichotomy. For Hutcheson and Frank, it is just a hunch, an intuition, which remains mysterious and unanalyzable. See Frank, *supra* note 2, at 655-56; Hutcheson, *supra* note 3. For Hart and Sachs, it is a certain psychological attitude toward judging, an openness and neutrality with respect to opposing positions. For Dworkin, at least in his most recent formulation in *Law's Empire*, it is a shared involvement in an interpretive project. See Dworkin, *Law's Empire* (1986).

authoritative legal materials. The legislators claim that under such circumstances, the judge freely chooses that rule which he or she individually determines best serves the needs and welfare of society. The intuitionists claim that the judge, acting as judge, can make no such free and individual choice, but is always constrained and limited by considerations unique to the judicial role.

Put this way, these differing accounts of the judicial process appear to be empirically testable, at least insofar as the judge's perception of his or her own decisionmaking process is thought to provide evidence of that process. The legislative model implies that judges, at least in some class of cases, feel themselves free to make whatever decision is in the best interests of society, based on their own perception of society's interests. The intuitionist model, by contrast, suggests that judges should feel, even in cases not controlled by authoritative legal materials, a push or constraint causally related to his or her understanding of the legal rule structure which, while not necessarily dispositive, limits or pushes the decisionmaking process in a certain direction.

III. JUSTICE BRENNAN'S LEGAL TRADITION

Which of these models, then, constitutes the view of judging set forth by Justice Brennan? The legal world Justice Brennan describes seems, at first blush, to bear far more resemblance to that of the intuitionists than that of the legislative theorists. Justice Brennan never describes himself as facing a judicial *tabula rasa*, a legal question in which authoritative legal materials have "run out" and he is free to decide whatever way he likes. Quite the contrary, Justice Brennan tells us that the world is not merely full, but overflowing with legal authority. Every time a litigant asserts a claim of due process, that litigant invokes a legal tradition deeply rooted in Anglo-American law. Justice Brennan makes it clear that in ruling on claims of due process, even novel claims not controlled by prior due process decisions, he, as a judge, must take into account that due process tradition; the historical form it has taken; and the way that tradition relates to, and will be affected by, the particular decision he is called upon to make in each case. Justice Brennan tells us that authoritative legal materials can have causal influence even when operating at very high levels of generality. The more fundamental and pervasive a rule is in our legal culture, the more real are its "penumbras" or "emanations" (those curious mystical phrases that enliven constitutional law) in that they continue to influence the thinking of judges, even after the

judge realizes that prior interpretations of the rule are not dispositive of the issue in the present case.

Justice Brennan, unlike the legislative theorists, does not view these general due process concepts as simply vague rhetorical formulas that may be invoked with equal validity and likelihood of success by either side in a due process argument. Rather, he sees them as carrying real weight, as lending credence to certain arguments that invoke the tradition in appropriate ways, and as weakening or discrediting other arguments that utilize a concept of due process which, while formally consistent with prior precedent, may nonetheless be inconsistent with the broader understanding of that concept dominant in the legal community and in the mind of the judge. Justice Brennan recognizes, of course, that the dominant understanding of these traditions can and will change over time, but that this does not negate the fact that, at any given time, a dominant conception will render various arguments about the due process clause "stronger" or "weaker" even in the absence of controlling precedent.

Thus far, Justice Brennan's views seem in line with the intuitionist account of the judicial process. He agrees that, even when there is no controlling precedent, there is "law" in the form of vaguer and more general legal traditions or concepts, which still enter into the uniquely judicial form of decisionmaking in a way legislators do not experience. Justice Brennan departs from the intuitionist model, however, by also presenting us with a picture of the judge as an individual, experiencing and sometimes struggling with the legal traditions under which he or she is operating and looking for ways to judge, evaluate, and critique them. This judge looks more like that of the legislative model, a strong-willed social critic who can, and does, shape the law in accordance with his or her independent social vision. But unlike the judge envisioned by the legislative model, who is simply free to make the law when authority runs out, Justice Brennan's judge must *work* to attain the freedom to change the law, must *work* to alter the dominant understandings so as to comport more closely with his or her individual conception of social justice.

Since Justice Brennan's legal world is filled with prevailing traditions and conceptions which push judicial outcomes in certain directions, he must, if he seeks to move the law in a different direction, confront and deal with those traditions. It is here that Justice Brennan invokes "passion" to counteract the claims of "reason," but his conception of passion is not irrational or anti-rational; it is simply a perspective of the world that is outside prevailing legal categories. For Justice Brennan, the dominant legal categories and traditional us-

ages are the conventional modes of legal "reason," and to go outside those categories involves exercising "passion."

The availability of these outside perspectives may make it seem that the judicial process is simply a matter of technique or craft, of finding the perspectives that permit one either to preserve or alter the dominant conception. Obviously, there is a large element of technique or craft in legal advocacy, and a judge, particularly an appellate court judge, must exercise such advocacy skills frequently. But when Justice Brennan describes that effort involved in applying passion to legal reasoning, he is speaking of more than just effective advocacy. He is speaking of convincing himself. "Passion" for Justice Brennan, seems to involve a broadening of one's own perspective, a way of looking at legal questions from outside traditional legal categories. Sometimes these perspectives reveal to him the inadequacies of the traditional legal categories, providing powerful arguments for change. Sometimes they do not.

Justice Brennan's discussion of *Goldberg v. Kelly*²⁰ nicely illustrates many of these themes. The case was one of first impression, in that the Court had never before ruled on whether a hearing was required before benefits to a welfare recipient could be terminated. Yet Justice Brennan does not approach the problem as a legislator, weighing the costs and benefits of holding such hearings, or even asking such basic questions as whether the preexisting system led to substantial numbers of improper terminations. Rather, he views the appropriate inquiry as a *legal* question, involving the scope and application of the due process clause. His inquiry is accordingly directed at determining how the due process clause affects this issue, not at simply determining what the best social policy is.

Having determined that the case must be decided by some analysis or interpretation of the legal meaning of due process, Justice Brennan then confronts the standard Realist dilemma. Perfectly plausible arguments can be made, based on well-established due process principles, both in favor of and against the requirement of a pretermination hearing. Certainly it is consistent with well-established due process notions to argue that formal trial-type procedures should be instituted before the state terminates a "property" interest consisting of a well founded expectation of future benefit payments. Such an argument, utilizing preexisting categories of due process analysis and seeking, by reasonable analogy to prior cases, to expand the boundaries of such categories, seems to Justice Brennan a "rational" argument.

²⁰ 397 U.S. 254 (1970).

By the same token, however, the dominant understanding of the due process clause, as set forth in prior cases, was that it did not always require a trial-type hearing prior to a taking, as long as the state had maintained other adequate safeguards against arbitrary action. Justice Brennan points out that, in *Goldberg*, the seven-day notice provision, right to submit a written statement, review procedures, and right to a post-termination hearing, could well have been considered to provide such adequate safeguards. Indeed, when coupled with the standard judicial reticence to overturn state procedures, particularly on constitutional grounds, Justice Brennan strongly hints that this would have been a winning argument, as long as the advocate stayed within preexisting legal categories.

Notice that this account thus far parallels, in many ways, intuitionist claims about judicial decisionmaking. Even though the decision is not controlled by prior precedent, the terms of the dispute are shaped by it, and the judge, by close attention to the argument, develops a sense as to which is the "stronger" or more appropriate application of preexisting due process concepts to the case at hand.

But the Court in *Goldberg* did not rule that the notice provision, the post-termination hearing and the other procedures provided adequate safeguards. And, Justice Brennan tells us, it did not rule that way because the Court was made aware of the "drastic consequences of terminating a recipient's only means of subsistence."²¹ The argument was not that termination of welfare benefits was like other takings of property, but that it was *different*, in that an individual deprived of basic requirements of subsistence was unlikely to pursue post-termination remedies, no matter how adequate under traditional due process standards. Thus, the argument that persuaded the Court (and presumably persuaded Justice Brennan as well) was not one that simply invoked preexisting legal categories, but one that functioned simultaneously as both a critique and an application of preexisting due process concepts.

The decision in *Goldberg v. Kelly*, as Justice Brennan presents it, was neither required by preexisting authority, nor created by legislating jurists. Rather, it was the result of a unique form of judicial work: the effort to reconcile legal categories and concepts, which all legal actors use to make sense of legal questions, with the broader set of facts, beliefs, information, and generalizations that we all use to make sense of the world. In *Goldberg*, certain facts about the nature of welfare and welfare recipients were used to undermine and alter prevail-

²¹ Brennan, Reason, Passion and "The Progress of the Law," 10 Cardozo L. Rev. 3, 20 (1988).

ing legal understandings of due process. Yet in other situations, as Justice Brennan tells us, new facts and alternative perspectives may not be able to alter prevailing legal understandings. This process of seeking to convince and persuade is itself one in which outcomes cannot be fully predicted.²²

CONCLUSION

Justice Brennan's essay does not seek to provide a theory of judicial decisionmaking, and although I have sought to generalize on the basis of his insights, I do not mean to turn it into one. The essay is far more rare and valuable as one judge's account of what the actual experience of the decisionmaking process is like. It reminds us of the difficulty any theory has of capturing the complexity of human experience. Nonetheless, it is only through categorizing and generalizing about human experience that we can talk about, study, and thereby aggregate our insights into the nature of our shared experience. Justice Brennan's essay suggests that legal authorities may also function as a set of generalized attitudes and conceptions that provide coherence and insight about the world of social relations, but that never fully capture the complexity of that world. Accordingly, the legal system always remains open to critique or change by fresh insights or perspectives from that larger social world that the preexisting legal structure failed to fully capture or appreciate.

For Justice Brennan, the mechanism for such change is the decisionmaking process of the judge himself or herself, who, although trained and inculcated with the prevailing legal categories and conceptions, must also remain open to arguments based on differing perspectives that reveal aspects of social reality not dealt with by prevailing legal concepts. Such a judge is, in some respects, like an artist simultaneously interpreting and expanding a particular artistic tradition, and in some respects, like a scientist, always open to revision of his or her theoretical presuppositions in the face of new data. Nonetheless, as Justice Brennan makes eminently clear, such a judge also possesses a kind of skill and imagination that is unique to the judicial craft.

²² Cf. J. Rawls, *A Theory of Justice* 48 (1971). Rawls' idea of "reflective equilibrium" describes a process whereby one's intuitive and nonreflective decision about a set of facts is subsequently modified and justified by theoretical and structural deliberation of legal principles, ultimately resulting in a satisfactory judicial decision. See also Kennedy, *supra* note 7 (describing a process of squaring intuition with legal principle).